

1 David Quesnel, WSBA No. 38579  
2 Rebecca Sells, WSBA No. 48192  
3 Klickitat County Prosecuting Attorney's Office  
4 205 S. Columbus Avenue, MS-CH 18  
5 Goldendale, WA 98620  
6 (509)773-5838  
7 davidq@klickitatcounty.org  
8 rebeccas@klickitatcounty.org  
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11

12 **UNITED STATES DISTRICT COURT OF**  
13 **EASTERN DISTRICT OF WASHINGTON**

14 CONFEDERATED TRIBES AND  
15 BANDS OF THE YAKAMA  
16 NATION,

17 Plaintiff,

18 v.

19 KLICKITAT COUNTY;  
20 KLICKITAT COUNTY SHERIFF'S  
21 OFFICE; BOB SONGER,  
22 KLICKITAT COUNTY  
23 DEPARTMENT OF THE  
PROSECUTING ATTORNEY; and  
DAVID QUESNEL

Defendants.

NO. 1:18-CV-03110-TOR

ANSWER

21 DEFENDANTS, by and through DAVID R. QUESNEL, Klickitat  
22 County Prosecuting Attorney, respectfully answer Plaintiff's Complaint as  
23 follows:

ANSWER– Page 1

**KLICKITAT COUNTY PROSECUTOR**  
205 S. Columbus Avenue  
MS-CH 18  
Goldendale, WA 98620  
(509)773-5838 • Fax (509)773-6696

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## 1. ANSWER TO INTRODUCTION

1.1 Defendants deny the allegations contained in paragraph 1.1 of Plaintiff's Complaint. Defendants deny that the attempts to regulate the sale of fireworks by Yakama Tribal Members on Yakama trust property outside the boundaries of the Yakama reservation pursuant to RCW 70.77 or any other applicable Washington statutes was unlawful or that defendants lacked jurisdiction. Defendants do not have sufficient facts as to whether those identified obtained permits through the Yakama Nation for the sale of fireworks and therefore deny this allegation.

1.2 Defendants admit that on June 26, 2018, Klickitat County Sheriff Bob Songer issued a "cease and desist" notice to individuals at businesses believed to be selling fireworks in violation of the laws of the State of Washington. Defendants admit that the notice would commence enforcement actions if activities in violation of the laws of the State of Washington did not cease.

1.3 The statement in Paragraph 1.3 constitutes legal argument, and no answer is required. The Treaty with the Yakamas of June 9, 1855, 23 Stat. 951 (1859) (hereafter the "Treaty of 1855"), moreover, speaks for itself. To any extent an answer is required defendants deny the allegations contained in paragraph 1.3.

1.4 The statement in Paragraph 1.4 constitutes legal argument, and no answer is required. To any extent an answer is required, Defendants deny the allegations contained in paragraph 1.4.

1           1.5 Paragraph 1.5 contains a prayer for relief. Defendants deny that  
2 the requested relief should be granted. Defendants deny that the regulation  
3 attempts under RCW 70.77 were improper or unlawful. Defendants deny that  
4 it should be enjoined from taking proper enforcement actions against any and  
5 all individuals selling fireworks in violation of the laws of State of  
6 Washington within Klickitat County outside the established boundaries of the  
7 Yakama reservation.

## 8                           **2. ANSWER TO JURISDICTION AND VENUE**

9           2.1 Defendants admit that this Court has jurisdiction over this action  
10 pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1362. Defendants deny that any  
11 claims arising under the Treaty of 1855 constitute federal law, as it is a “treaty  
12 of the United States” within both 28 U.S.C. § 1331 and 28 U.S.C. § 1362.

13           2.2 Defendants admit that 28 U.S.C. § 2201 and 28 U.S.C. § 2202  
14 authorize relief in certain matters, but deny any such relief is appropriate in  
15 this case.

16           2.3 Defendants admit the allegation in Paragraph 2.3.

## 17                           **3. ANSWER TO PARTIES**

18           3.1 Defendants admit that the Yakama Nation is a federally  
19 recognized tribe and a signatory to the Treaty of 1855. The remainder of  
20 Paragraph 3.1 is legal argument and requires no answer. To the extent these  
21 allegations require an answer, Defendants deny them.

## 22                           **4. ANSWER TO DEFENDANTS**

1           4.1 Defendants admit that Klickitat County is a political subdivision  
2 of the State of Washington.

3           4.2 Defendants admit the allegations contained in paragraph 4.2 of  
4 Plaintiff's Complaint.

5           4.3 Defendants admit that Bob Songer is the Klickitat County Sheriff  
6 and that he is being sued in his official capacity.

7           4.4 Defendants deny the allegations contained in paragraph 4.4 of  
8 Plaintiff's Complaint as there is no "Department" of the Prosecuting Attorney.  
9 Defendants admit there is a Prosecuting Attorney's Office that is an agency of  
10 Klickitat County and that it headed by the duly elected official called the  
11 Prosecuting Attorney.

12           4.5 Defendants deny that David Quesnel is "a" Prosecuting Attorney  
13 but admits that David Quesnel is the Prosecuting Attorney for Klickitat  
14 County. Defendants deny that Prosecutor Quesnel is being sued in his official  
15 capacity as a county officer. Defendants admit that Prosecutor Quesnel is  
16 being sued in his official capacity as a state officer.

17                   **5. ANSWER TO FACTUAL BACKGROUND**

18           5.1 Defendants admit that the Yakama Nation is a federally  
19 recognized tribe and a signatory to the Treaty of 1855. The remainder of  
20 Paragraph 5.1 is legal argument and requires no answer. To the extent these  
21 allegations require an answer, Defendants deny them.

22           5.2 Defendants admit the allegations of paragraph 5.2.  
23

1           5.3 Paragraph 5.3 is legal argument and requires no answer. To the  
2 extent this allegation requires an answer, Defendants deny it. The State of  
3 Washington assumed partial civil and criminal jurisdiction over the Indian  
4 territory, including trust allotments, and tribal members pursuant to Public  
5 Law 280, by enacting Laws of 1963, ch. 36 (codified in chapter 37.12 RCW).

6           5.4 Defendants are without knowledge or sufficient information to  
7 know whether the allegations are true, and therefore deny them.

8           5.5 Paragraph 5.5 is legal argument and requires no answer. To the  
9 extent this allegation requires an answer, Defendants deny it. Defendants do  
10 not have sufficient knowledge as to whether the Yakama Nation issued  
11 fireworks permits to Yakama Members, or what the terms of such permits  
12 would include.

13           5.6 Defendants admit that Sheriff Bob Songer issued “cease and  
14 desist” notices to individuals believed to be selling fireworks in violation of  
15 the laws of State of Washington that threatened enforcement actions if  
16 activities in violation of state law did cease within 24 hours of receipt of the  
17 notice.

18           5.9 (sic) Defendants admit that Yakama Nation’s legal counsel  
19 attempted to contact Defendant Songer on June 27, 2018, but that such contact  
20 was not made. Defendants are unable to determine what the intent of the  
21 contact was because the contact never took place, and therefore denies the  
22 remainder of this allegation.

1           5.10 Defendants admit that a phone call between Prosecuting Attorney  
2 David Quesnel and Yakama Nation legal counsel Ethan Jones took place on  
3 June 27, 2018. Defendants admit that Mr. Quesnel was unable to meet in  
4 person in Goldendale on short notice due to scheduling demands and the fact  
5 that Mr. Quesnel was not in Goldendale, but stated Klickitat County would  
6 move forward with enforcement.

7           5.11 Defendants admit that it received a letter on June 27, 2018,  
8 demanding the County stop with the enforcement action. The content of that  
9 letter speaks for itself.

10           5.7 (sic) Paragraph 5.7 is legal argument and requires no answer.  
11 To the extent this allegation requires an answer, Defendants deny it.

12           5.8 Paragraph 5.8 is legal argument and requires no answer. To the  
13 extent this allegation requires an answer, Defendants deny it. The State of  
14 Washington assumed partial civil and criminal jurisdiction over the Yakama  
15 Reservation and tribal members pursuant to Public Law 280, by enacting  
16 Laws of 1963, ch. 36 (codified in chapter 37.12 RCW).

17           5.12 (sic) Paragraph 5.12 is legal argument and requires no answer.  
18 To the extent this allegation requires an answer, Defendants deny it.

## 19           **6. ANSWER TO FIRST CLAIM FOR RELIEF**

20           6.1 Defendants hereby incorporate and assert their answers to all  
21 prior allegations by reference. As to any and all allegations in Plaintiff's  
22 Complaint for Declaratory and Injunctive Relief not expressly admitted or  
23 denied in prior answers, Defendants deny the same.

1           6.2 Paragraph 6.2 is legal argument and requires no answer. To the  
2 extent this allegation requires an answer, Defendants deny it.

3           6.2 (sic) Paragraph 6.2 is legal argument and requires no answer.  
4 To the extent this allegation requires an answer, Defendants deny that their  
5 exercise of jurisdiction granted to the State by Public Law 280, RCW  
6 37.12.010, and Proclamation 14-01 violated or violates the rights reserved to  
7 the Yakama Nation in the Treaty of 1855. Defendants deny that their exercise  
8 of jurisdiction granted to the State by Public Law 280, RCW 37.12.010, and  
9 Proclamation 14-01 violates federal law. Defendants deny that their exercise  
10 of jurisdiction granted to the State by Public Law 280, RCW 37.12.010, and  
11 Proclamation 14-01 directly violates the Yakama Nation's inherent  
12 sovereignty and Treaty-reserved jurisdiction over its enrolled Members'  
13 actions.

14           6.3 The allegations in Paragraph 6.3 constitute legal argument and  
15 requires no answer. To the extent this allegation requires an answer,  
16 Defendants incorporate the response provided in section 6.2.

## 17                           **7. ANSWER TO REQUEST FOR RELIEF**

18           In answer to Plaintiff's request for relief set forth at Paragraph (A) of  
19 Plaintiff's Complaint for Declaratory and Injunctive Relief, and any  
20 allegations contained therein, Defendants deny the allegations and denies that  
21 Plaintiff's request for relief should be granted. As to any and all allegations in  
22 Plaintiff's Complaint for Declaratory and Injunctive Relief not expressly  
23 admitted or denied, Defendants deny the same.

1 In answer to Plaintiff's request for relief set forth at Paragraph (B) of  
2 Plaintiff's Complaint for Declaratory and Injunctive Relief, and any  
3 allegations contained therein, Defendants deny the allegations and denies that  
4 Plaintiff's request for relief should be granted. As to any and all allegations in  
5 Plaintiff's Complaint for Declaratory and Injunctive Relief not expressly  
6 admitted or denied, Defendants deny the same.

7 In answer to Plaintiff's request for relief set forth at Paragraph (C) of  
8 Plaintiff's Complaint for Declaratory and Injunctive Relief, and any  
9 allegations contained therein, Defendants deny the allegations and denies that  
10 Plaintiff's request for relief should be granted. As to any and all allegations in  
11 Plaintiff's Complaint for Declaratory and Injunctive Relief not expressly  
12 admitted or denied, Defendants deny the same.

### 13 **8. DEFENSES AND REQUESTED RELIEF**

14 WHEREFORE, having fully answered the Yakama Nation's Complaint  
15 for Declaratory and Injunctive Relief, Defendants assert that discovery and  
16 investigation may reveal that any one or more of the following affirmative  
17 defenses should be available to them in this matter. Defendants therefore  
18 assert the following affirmative defenses in order to preserve the right to assert  
19 them. If the facts warrant, Defendants may withdraw any of these affirmative  
20 defenses as may be appropriate. Further, Defendants reserve the right to  
21 amend this Answer to assert additional defenses, cross claims, counterclaims,  
22 or other defenses. By way of further answer and affirmative defenses,  
23 Defendants allege:



## 8.1 Facts Supporting Affirmative Defenses

8.1.1 Prosecutor Quesnel functions as both a state officer and a county officer. See Laws of 2008, ch. 309, § 1 (“The legislature finds that an elected county prosecuting attorney functions as both a state officer in pursuing criminal cases on behalf of the state of Washington, and as a county officer who acts as civil counsel for the county.”).

8.1.2 A significant portion of Prosecutor Quesnel’s salary is paid by the State of Washington, rather than by Klickitat County. *See* RCW 36.17.020(11).

8.1.3 Prosecutor Quesnel may be removed from office by the Washington State Legislature. Wash. Const. art. IV, sec. 9.

8.1.4 Prosecutor Quesnel acts as a state officer when preparing to prosecute and when prosecuting violations of state law. *See generally* *Whatcom County v. State*, 99 Wn. App. 237, 993 P.2d 273 (2000).

8.1.5 Under Public Law 280, 67 Stat. 588 (1953), codified as amended at 18 U.S.C. § 1162, Washington State assumed civil and criminal jurisdiction over all Indian country, including trust allotments, within the state as codified in RCW 37.12.010. *State v. Comenout*, 173 Wash. 2d 235, 238-39, 267 P.3d 355, 357 (2011), *cert. denied*, *Comenout v. Washington*, 566 U.S. 989 (2012); (quoting *State v. Cooper*, 130 Wash. 2d 770, 775-76 (1996)).

8.1.6 In 2014, Washington State partially retroceded jurisdiction it had assumed under Public Law 280 back to the Yakama Nation, but expressly stated that “[o]utside the exterior boundaries of the Yakama Reservation, the

1 State does not retrocede jurisdiction. The State shall retain all jurisdiction it  
2 assumed pursuant to RCW 37.12.010 in 1963 over the Yakama Nation's  
3 Indian country outside the Yakama Reservation." Gubernatorial Retrocession  
4 Proclamation 14-01, *available at* [https://www.governor.wa.gov/sites/](https://www.governor.wa.gov/sites/default/files/proclamations/proc_14-01.pdf)  
5 [default/files/proclamations/proc\\_14-01.pdf](https://www.governor.wa.gov/sites/default/files/proclamations/proc_14-01.pdf).

6 8.1.7 Thus, the State retained the full civil and criminal state  
7 jurisdiction over off-reservation allotments that it had assumed under  
8 Public Law 280.

9 8.1.8 The lands on which Yakama members were selling fireworks  
10 are alleged to be trust allotments outside the boundaries of the Yakama  
11 reservation. To date, Plaintiffs have provided no evidence that the properties  
12 in question are considered trust allotments as defined by the federal  
13 government.

14 8.1.9 The Washington State fireworks law, codified at RCW Chapter  
15 70.77, is a criminal/prohibitory law. *See United States v. Marcyes*, 557 F.2d  
16 1361, 1364 (9th Cir. 1977) ("Washington's fireworks law is a prohibitory  
17 rather than a regulatory law"); *Brown v. City of Yakima*, 116 Wash. 2d 556,  
18 563 (1991) (same).

19 8.1.10 Allotted or trust lands are not excluded from the state's full  
20 assumption of criminal jurisdiction "unless they are 'within an established  
21 Indian reservation.'" *Id.* (quoting RCW 37.12.010); *see also United States v.*  
22 *Approximately One Million Seven Hundred Eighty Four Thousand*

1 (1,784,000) *Contraband Cigarettes*, No. C12-5992 BHS, 2016 WL 7387094,  
 2 at \*5 (W.D. Wash. Dec. 21, 2016) (reaching same result).

3 8.1.11 Although the legislature passed a provision in 1995 stating that  
 4 the fireworks law was regulatory rather than prohibitory (RCW 70.77.111),  
 5 the amendments to the law did not remove the public safety policy behind the  
 6 law and criminal provisions in the law were left intact (*see* RCW §§  
 7 70.77.510, .515, .517, .520, and .540), nor does the legislative history contain  
 8 any mention of tribes or tribal lands. The statement in RCW 70.77.111 that the  
 9 law is regulatory is directly contradicted by RCW 70.77.545, which  
 10 recognizes the overall criminal character of the chapter by stating that “[t]he  
 11 inclusion in this chapter of criminal penalties does not preclude enforcement  
 12 of this chapter through civil means.”

13 8.1.12 The general prohibitory tenor of the fireworks law coupled with  
 14 its continued purpose to protect the “general welfare of [state] citizens” is left  
 15 largely unchanged by the 1995 amendment, leaving the bases upon which the  
 16 Ninth Circuit in *Marcy* concluded that the law was prohibitory still valid  
 17 and controlling. *See Marcy*, 557 F.2d at 1364-65.

18 8.1.13 Even if the law were considered to be regulatory, the County  
 19 would still have jurisdiction to enforce it on trust allotments off-reservation.

## 20 **8.2 Affirmative Defenses.**

21 8.2.1 Yakama Nation fails to state a claim upon which relief can be  
 22 granted.



**AFFIDAVIT OF SERVICE**

I, Jessica Schiebel, declare under penalty of perjury under the laws of the State of Washington that on the 16<sup>h</sup> day of August, 2018, I served a copy of the following documents as set forth below:

Yakama Nation  
Office of Legal Counsel  
P.O. Box 150  
Toppenish, WA 98948

by means of: ☒ USPS First Class Mail

☒ OTHER:  
Answer (12 pages)

DATED this 16<sup>th</sup> day of August, 2018.

/S/ Jessica Schiebel

Jessica Schiebel  
Legal Administrative Assistant